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In the Supreme Court of the United States

OCTOBER TERM, 1996

WALKER L. CHANDLER, SHARON T. HARRIS, JAMES D. WALKER,

Petitioners,

v.

ZELL D. MILLER, GOVERNOR; LEWIS A. MASSEY, SECRETARY OF STATE OF GEORGIA; JAMES G. LEDBETTER, COMMISSIONER, DEPARTMENT OF HUMAN RESOURCES, STATE OF GEORGIA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Have respondents shown, in accordance with the Fourth Amendment presumption against suspicionless searches, special needs sufficiently compelling to justify the substantial invasion of privacy caused by mandatory suspicionless drug testing of candidates for elected office?

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and privacy embodied in the Constitution. The ACLU of Georgia is one of its local affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court as direct counsel and *amicus curiae*. *See, e.g., Whren v. United States of America*, 116 S. Ct. 1769 (1996); *Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). Because this case addresses an important Fourth

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

Amendment question, its proper resolution is a matter of significant concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. As part of its mission, NACDL strives to defend individual liberties guaranteed by the Bill of Rights. Due to the important Fourth Amendment issue at stake, NACDL has a substantial interest in the final outcome of this case.

STATEMENT OF THE CASE

In 1990, the Georgia legislature enacted Georgia Code Ann. § 21-2-140, requiring candidates for certain elected offices to submit to and pass a drug test in order to qualify for nomination or election.[2] The covered offices are: the Governor, Lieutenant

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[2] Section 21-2-140 provides in full:

(a) As used in this Code section, the term:

(1) "Candidate" means any person seeking to qualify for nomination or election to a state office in this state.

(2) "Established drug test" means the collection and testing of bodily fluids administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Regulations, 53 Fed. Reg. 11979, *et seq.*, as amended) or other professionally valid procedures approved by the commissioner of human resources.

(3) "Illegal drug" means marijuana or any of the following controlled substances included in Schedule I or II of Code Section 16-13-25 or 16-13-26: cocaine; opiates; amphetamines; or phencyclidines, except when used pursuant to a valid prescription or when used as otherwise authorized by state or federal law.

(4) "State office" includes the office of any of the following: the Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission.

(b) Each candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs.

(c) At the time a candidate for state office qualifies for nomination or election, each such candidate shall file a certificate with the officer with whom such candidate qualifies stating that such candidate has been tested for illegal drugs as required under this Code section within 30 days prior to qualifying for nomination or election to state office and that the results of such test are negative. Such certificate shall be in a form approved by the Secretary of State from a laboratory listed by the commissioner of human resources under subsection (e) of this Code section. Such tests shall be conducted at the expense of the candidates; provided, however, that upon submission of a valid pauper's affidavit and valid receipt, a candidate shall be reimbursed by the Secretary of State for the cost of such test in an amount not to exceed $50.00. No candidate shall be allowed to qualify for nomination or election to a state office unless he or she presents such certificate for filing at the time of such qualification.

(d) The certificates required under subsection (c) of this Code section shall be filed with the Secretary of State and shall be available for public inspection. If a candidate qualifies with a political party for nomination or election to a state office, such party shall submit all such certifications to the Secretary of State at such time as such candidates are certified by the party to the Secretary of State. Such certificates shall be maintained by the Secretary of State for a period of three years.

(e) The commissioner of human resources shall be authorized to establish guidelines governing the administration of drug tests performed pursuant to this Code section and shall maintain a list of those laboratories qualified to conduct established drug tests.

(f) The commissioner of human resources and the Secretary of State shall be authorized to promulgate rules and regulations to carry out the provisions of this Code section.

Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme

Court, Judges of the Court of Appeals, Judges of the Superior Courts, District Attorneys, members of the General Assembly, and members of the Public Service Commission. Georgia Code Ann. § 21-2-140(a)(4).

At the time a candidate qualifies for nomination or election, the candidate must submit a certificate from an HHS-certified laboratory stating that the candidate has submitted to a drug test within the prior 30 days and has tested negative for marijuana, cocaine, opiates, amphetamines, and phencyclidines—except when any of those substances has been used pursuant to a valid prescription. The candidate may produce the urine specimen at the laboratory or at a physician's office. In either case, however, the specimen must be produced in accordance with the detailed procedures for supervising and monitoring the collection of specimens set forth in § 2.2(f) of the Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11979 (1988) (hereinafter the "HHS Guidelines"). *See* Georgia Code Ann. §§ 21-2-140(a)(3), 21-2-140(c); (D. Ct. Consent Order and Final Judgment, Jan. 31, 1995, ¶ 4.) Those procedures are set forth in detail *infra* at pages 14-15.

Petitioners, candidates for Lieutenant Governor, Commissioner of Agriculture and General Assembly of Georgia, filed this action in the United States District Court for the Northern District of Georgia in May 1994. Petitioners sought a declaration that section 21-2-140 is unconstitutional, alleging, *inter alia*, that it violated the Fourth Amendment's prohibition against unreasonable searches and seizures. After the parties stipulated to the facts, the district court found that respondents' interests outweighed the privacy rights of petitioners, and ruled in favor of the respondents. A divided panel of the United States Court of Appeals for the Eleventh Circuit affirmed. (The Eleventh Circuit's decision is published at 73 F.3d 1543 (11th Cir. 1996).) This Court granted a petition for writ of certiorari. 65 U.S.L.W. 3086 (Oct. 1, 1996).

SUMMARY OF ARGUMENT

In order to overcome the Fourth Amendment's strong presumption against suspicionless searches, respondents must show that the testing of candidates for elected office required under section 21-2-140 of the Georgia Code serves compelling special needs and that the privacy interests implicated by section

21-2-140 are minimal. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989); *Vernonia School District 47J v. Acton*, 115 S. Ct. 2386, 2394-95 (1995). Respondents have failed to carry this burden.

This Court has repeatedly emphasized that suspicionless drug testing passes constitutional muster only where it is aimed at specific and immediate threats. No such threat exists here. There is no evidence of a drug problem among Georgia's elected officials. Nor do such officials—ranging from the Public Service Commissioner to members of the General Assembly—(i) typically perform safety-sensitive tasks as to which momentary impairment can cause irreparable harm, or (ii) are on the front-lines of Georgia's drug interdiction efforts.

On the other hand, the privacy interests implicated by section 21-2-140 are substantial. The collection and testing of urine "intrudes upon expectations of privacy that society has long recognized as reasonable." *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602, 617 (1989). The testing procedures implemented under the Georgia statute do little to minimize this inherent intrusion. Nor is the level of intrusiveness diminished by the fact that candidates may subject themselves to scrutiny by the media and the electorate. Such scrutiny does not mean that candidates for public office forfeit their expectations to be free from invasive and unreasonable *government* searches. Finally, the circumstances in which these privacy concerns arise distinguish this case from those in which this Court has upheld suspicionless drug testing. Section 21-2-140 treads upon fundamental voting and election privileges. As a precondition to qualification for elected office, section 21-2-140 requires candidates to submit to an intrusive drug test. For these reasons, Georgia Code Ann. § 21-2-140 is unconstitutional.

ARGUMENT

GEORGIA CODE ANN. § 21-2-140 VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Fourth Amendment abhors suspicionless searches. The "Amendment's proscription of 'unreasonable searches and seizures' must be read in light of 'the history that gave rise to the words.'"

Chimel v. California, 395 U.S. 752, 760-61 (1969) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting)). Because that history shows that the primary concern of the drafters of Fourth Amendment was suspicionless searches, *see* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483, 487-517 (1995), this Court consistently has held that such searches are permissible only in the most "limited circumstances." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989).

In short, this Court applies a strong presumption against suspicionless searches. To "justify the intrusion on privacy entailed by conducting . . . searches without any measure of individualized suspicion," the government must show that: (1) the search serves compelling special needs, *Von Raab*, 489 U.S. at 665, 668; *Vernonia School District 47J v. Acton*, 115 S. Ct. 2386, 2394-95 (1995); and (2) "the privacy interests implicated by the search are minimal." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989). As demonstrated below, respondents have failed to meet that burden with respect to section 21-2-140 of the Georgia Code.[3]

I. Respondents Have Failed to Show Sufficiently Compelling Special Needs to Justify the Suspicionless Drug Testing of Candidates for Elected Office in Georgia.

Comparing section 21-2-140 of the Georgia Code with the drug testing programs upheld in *Skinner*, *Von Raab* and *Acton* highlights respondents' failure to demonstrate sufficiently compelling needs to impose suspicionless drug testing on a broad array of candidates for elected office. *Skinner* involved Federal Railroad Administration ("FRA") regulations requiring testing of employees involved in train accidents. *Id.* at 606-07. The FRA

[3] It is now well settled that government-mandated urinalysis is a search that implicates the Fourth Amendment. *Skinner*, 489 U.S. at 617. Respondents concede that because section 21-2-140 requires candidates for elected office to submit to and pass a drug test, section 21-2-140 is a search under the Fourth Amendment. (*See* Respondents' Ct. App. Bf. at 9.)

adopted those regulations in the context of a documented history of drug abuse by train crews. Between 1975 and 1983, drug and alcohol impairment had caused at least 45 train accidents, 34 fatalities, 66 injuries and $28 million in property damages. *Id.* at 608. In light of this evidence, the Court carefully scrutinized the duties of the covered employees and determined that the FRA's asserted safety concerns were sufficiently compelling to justify drug testing. The Court noted that those subject to testing were engaged in "safety-sensitive tasks with such risks of injury to others that even a momentary lapse of attention c[ould] have disastrous consequences." *Id.* at 620, 628. Like those with "routine access to dangerous nuclear power facilities," the covered employees subject to testing "[could] cause great human loss before any signs of impairment became noticeable to supervisors or others." *Id.* at 628.

In *Von Raab*, the Court reviewed a testing regime that covered selected Customs Service employees: "front-line" drug enforcement personnel, those who carried firearms and those who handled classified material. *Von Raab*, 489 U.S. at 657, 660-61. Once again, the Court carefully scrutinized the covered positions. The Court determined that the Customs Service had a sufficiently compelling interest to justify the suspicionless testing of front-line drug enforcement personnel and those who carried firearms because these positions implicated immediate safety concerns. The duties of front-line drug enforcement personnel were "fraught with obvious dangers to the mission of the agency and the lives of Customs agents." *Id.* at 660-61. Many of these employees dealt directly with dangerous smugglers and were directly exposed to large amounts of illegal narcotics. *Id.* at 669. Similarly, those who carried firearms were required to "make instant life or death decisions." *Id.* at 661. Thus, "even a momentary lapse of attention [could] have disastrous consequences." *Id.* at 670. Significantly, though, the Court remanded to the court of appeals the question whether employees who handled classified material could be tested. The Court noted that the threat of harm attendant upon drug use by these employees appeared to be less immediate and direct. *Id.* at 678.

Finally, in *Acton*, the Court considered the mandatory drug testing of high school student-athletes. The school district had adopted its drug testing policy in response to what the Court

emphasized was an "immediate crisis." *Acton*, 115 S. Ct. at 2388, 2395. According to the school district, "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion[.] [D]isciplinary actions had reached 'epidemic proportions,' [and] the rebellion was being fueled by alcohol and drug abuse as well as by the students' misperceptions about the drug culture." *Id.* at 2395. The district had tried less intrusive measures—special classes, speakers, presentations, and drug-sniffing dogs—without success. *Id.* at 2389. The Court also emphasized that the consequences of drug use by a student-athlete were immediate and substantial. Among student-athletes, the Court observed, "the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, [illegal] drugs . . . have been demonstrated to pose substantial risks to athletes." *Id.* at 2395. Only in light of these circumstances, as well as the diminished expectation of privacy enjoyed by children entrusted to the special care of the state, did the Court uphold the school district's drug testing program.

Fairly read, *Skinner*, *Von Raab* and *Acton* do not authorize the government to engage in suspicionless drug testing wherever it chooses. Rather, the Court's drug testing decisions have been carefully crafted to emphasize that suspicionless testing passes constitutional muster only where it is aimed at specific and immediate threats. No such justification can be offered in this case. At the outset, we note the lack of any record evidence—as there was in both *Skinner* (where there was substantial evidence of widespread substance abuse among the employees subject to testing) and *Acton* (where there was an "immediate crisis" caused by an alleged sharp rise in drug use among the student-athletes to be tested)—of a drug problem among the offices covered by section 21-2-140.

The only statutory objective offered by respondents—the desire to assure that those qualifying for the enumerated offices "have what it takes to exercise their best judgment" (Respondents' Ct.

App. Bf. at 15)[4]—is neither specific nor immediate. While assuring that those who have important responsibilities "have what it takes to exercise their best judgment" is a laudable goal, it is simply too general to justify suspicionless drug testing. If the government were able to overcome the Fourth Amendment's presumption against suspicionless searches by showing only that a government agency's or department's mission was important, and reciting the truism that the agency or department would more successfully achieve its mission if its employees were drug-free, then the presumption would have no meaning at all. Virtually any government employee or prospective government employee could be forced to submit to suspicionless searches. Such a result is, of course, fundamentally inconsistent with this Court's decisions. Suspicionless drug testing is permissible only in exceptional circumstances. As the Court specifically warned in *Acton*: "We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." *Id.* at 2396.

Further, the threat of harm from which respondents claim they are protecting the public is too remote to justify suspicionless drug testing. While the positions for which candidates are subject to testing are unquestionably important, the threats posed by those elected to them are not analogous to those posed by the covered employees in *Skinner* and *Von Raab* or the student-athletes in *Acton*. A public official's pen simply does not present the same sort of dangers, with the same degree of immediacy, as a speeding train, a nuclear power plant, a firearm or even a helmeted football player.[5] Indeed, because of numerous checks and balances on their

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[4] Since the Georgia Assembly has not articulated, either in the text of the statute, any preface thereto, or in any official legislative history, its purpose for enacting the statute, we must rely on counsel for respondents to articulate the government's purpose.

[5] Many of the positions covered by section 21-2-140 have absolutely no safety-sensitive responsibilities. The Secretary of State, for example, is responsible for enforcing Georgia's securities laws and corporations law, and has other record keeping duties. Georgia Code Ann. §§ 10-5-10, 14-5-20, 45-13-20. The Public Service Commission regulates utilities. Georgia Const. Art. 4, § 1, ¶ I. The Commissioner of Insurance presides over the Insurance Department. Georgia Code Ann. § 33-2-1. The

acts, elected officials cannot "cause great human loss before any signs of impairment become noticeable to . . . others." *Skinner*, 489 U.S. at 628. For example, members of the Georgia General Assembly cannot act alone. Elected officials within the executive branch must answer to the Governor. Actions of the executive branch (including those of the Governor) are carefully scrutinized by the press and the General Assembly. Judges are subject to discipline, impeachment and, in many cases, reversal on appeal. As the Court of Appeals for the D.C. Circuit wrote regarding a similar issue raised by the proposed testing of lawyers in the Department of Justice:

> Certainly a blunder by a Justice Department lawyer may lead, through a chain of ensuing circumstances, to a threat to public safety. That sort of indirect risk, however, is wholly different from the risk posed by a worker who carries a gun or operates a train. . . . *Von Raab* and *Skinner* focused on the immediacy of the threat. The point was that a single slip-up by a gun-carrying agent or a train engineer may have irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other government personnel have an opportunity to intervene before the harm occurs. *Von Raab* provides no basis for extending this principle to the Justice Department, where the chain of causation between misconduct and injury is considerably more attenuated.

Harmon v. Thornburgh, 878 F.2d 484, 491 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990) (emphasis omitted).

Nor are the covered offices here on the front-lines of drug interdiction. Members of the General Assembly, the Commissioner of Insurance, the Secretary of State, members of the Public Service Commission, the Commissioner of Agriculture and the Commissioner of Labor have no responsibilities involving drug interdiction. *See* Georgia Code Ann. §§ 10-5-10, 14-5-20, 45-13-20, 33-2-1, 2-2-7, 34-2-3; Georgia Const. Art. 4, § 1, ¶ I. While holders of the other offices may have some indirect involvement with the administration of Georgia's drug interdiction laws, they

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Commissioner of Agriculture presides over the Department of Agriculture. Georgia Code Ann. § 2-2-7. The Commissioner of Labor presides over the Department of Labor. Georgia Code Ann. § 34-2-3.

are not typically involved in "front-line" drug interdiction. If indirect duties relating to the implementation and enforcement of our drug laws had sufficed in *Von Raab*, the Court would have upheld the Customs program in its entirety. *All* Customs employees have duties that relate in some way to one of the basic missions of the Customs Service—interdicting narcotics. Nonetheless, the Court declined to sanction (and remanded to the district court the issue of) the suspicionless testing of at least one group of Customs employees—those who were subject to suspicionless testing solely by virtue of their access to classified materials. *Von Raab*, 489 U.S. at 677-78.

To be sure, some of the positions covered by section 21-2-140 are exposed more closely to illegal drugs and drug users than are others. Nevertheless, the circumstances in which drug-related bribery, blackmail or violence might occur are much more remote for holders of those positions than they were for the Customs officials in *Von Raab*. The contacts those officials have with drug traffickers and illegal drugs are more unregulated and less controlled than those that any of the elected officials covered by section 21-2-140 would have in the course of their official duties. Accordingly, the record before this Court contains not a single instance of bribery or blackmail among or violence upon officials holding *any* of the covered positions. The possibility of such an occurrence simply does not offer a compelling justification for suspicionless drug testing here.

Of course, if the need for suspicionless drug testing in this case had been truly compelling—had the slip of an official's pen the same potential for immediate harm as a train operator's lapse—Georgia's testing regime would not be limited to candidates alone. It would provide for the testing of elected officials. Indeed, Section 21-2-140 is manifestly ineffective in achieving even respondents' own asserted goal of a government whose elected officials exercise judgment unimpaired by drugs. In choosing to test only candidates rather than office-holders, respondents have done little to ensure that their government is in fact drug free.

What this suggests, of course, is that the Georgia Assembly enacted section 21-2-140 as merely a symbolic gesture. According to one account, the bill was introduced to show the public that politicians are willing to take drug tests as well as impose them on

others. Edith M. Shine, *Crimes and Offenses*, 9 Ga. St. U. L. Rev. 212, 218 (1992). Similarly, perhaps the Georgia Assembly simply wanted to build public confidence by showing that leaders in the Georgia government are drug free. Either purpose would be impermissible. As Justice Scalia has written: "[T]he impairment of individual liberties cannot be the means of making a point. [S]ymbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." *Von Raab*, 109 S. Ct. at 1401-02 (Scalia, J., dissenting).[6]

Nor can respondents justify section 21-2-140 as a means of assuring Georgia's citizens that those occupying important elected positions in Georgia's government are firmly committed to winning the war against drugs. Such a viewpoint-based restriction on holding public office would be flatly inconsistent with the First Amendment. In *Bond v. Floyd*, 385 U.S. 116, 135-37 (1966), this Court held that the Georgia House of Representative's exclusion of an elected Representative because of his criticism of the government's policy in Vietnam violated the First Amendment. The Court explained that "the manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment . . . is that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 135-36 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). This would be an empty holding indeed if the government could stop any candidate who held an unpopular view from running for office.

There may well be citizens of Georgia who share a commitment to the Fourth Amendment and would wish to support a candidate who is likewise opposed to suspicionless drug testing. That ought

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[6] Although the Commissioner of the Customs Service had declared that the drug testing program at issue in *Von Raab* "'would set an important example in our country's struggle with this most serious threat to our national health and security,'" 489 U.S. at 686 (Scalia, J., dissenting) (citation omitted), the Court declined to rely on that rationale in its opinion, focusing instead on the specific threats posed by drug use in the positions subject to testing.

to be their choice, just as others may choose to vote against a candidate for similar reasons. Thus, the fact that this case involves electoral politics undermines, rather than supports, the government's asserted interest in testing.

II. The Suspicionless Drug Testing Program Here at Issue Is a Substantial Invasion Upon Petitioners' Privacy Interests

As the preceding analysis demonstrates, the government's concerns under the Georgia statute are lacking in both immediacy and efficacy. The same cannot be said for petitioners' privacy interests. First, no matter how discreet, "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable." *Skinner*, 489 U.S. at 617. Second, the testing regime at issue—from the collection procedures to the timing of the drug test—does little to minimize the intrusion inherent in drug testing. Third, that candidates for public office may subject themselves to scrutiny by the media and electorate does not mean that they forfeit the expectation that they will be free from government-sponsored searches. Finally, the context in which these privacy concerns arise distinguishes this case from those in which the Court has upheld suspicionless drug testing. Much more is at stake here than the right to play high school football or even to apply for a government job. Section 21-2-140 implicates fundamental voting and election privileges inherent in our democratic form of government.

Any drug test, no matter how carefully tailored, interferes with "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men," *Winston v. Lee*, 470 U.S. 753, 758 (1985) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)), and the right to be free from government surveillance. *Katz v. United States*, 389 U.S. 347, 359 (1967).[7] By its very nature, drug testing affects significant privacy

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[7] Almost all lower courts have followed this Court's characterization of the privacy interest. *See also National Treasury Employees Union v. Yeutter*, 918 F.2d 968, 974 (D.C. Cir. 1990) ("[M]andatory urinalysis represents a substantial intrusion on employee privacy."); *Taylor v. O'Grady*, 888 F.2d 1189, 1197 (7th Cir. 1989) ("All urinalysis programs implicate serious privacy concerns regardless of how carefully tailored

concerns. It violates the subject's bodily integrity, discloses information "concerning the state of the subject's body, and the materials he [or she] has ingested," *Acton*, 115 S. Ct. at 2393, and necessarily requires a lowering of the "traditional[] shield[]," *Skinner*, 489 U.S. at 626, around the excretory function. As this Court has noted: "There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all." *Skinner*, 489 U.S. at 617.[8]

The testing procedures contemplated by section 21-2-140 do not appreciably lessen the nature of this intrusion. At the time a candidate qualifies for nomination or election,[9] the candidate must submit a certificate from an HHS-certified laboratory stating that he or she has been tested within the prior 30 days and has tested negative for non-prescriptive marijuana, cocaine, opiates, amphetamines and phencyclidines.

While section 21-2-140 allows a candidate to produce the urine specimen at a physician's office, any salutary effect that allowance might have on the candidate's personal dignity is substantially undermined by the collection procedures the physician's office is required to follow in accordance with the HHS Guidelines. A candidate must: remove all unnecessary outer garments; wash and dry his or her hands; prior to providing the specimen, "remain in the presence of the collection site person and . . . not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other materials which could be used to adulterate the specimen"; and provide the specimen in a stall or otherwise partitioned area. HHS Guidelines § 2.2 (f). Prior to urination, the person collecting the specimen must observe the prospective candidate and note any

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the program is designed.").

[8] *See also* Charles Fried, *Privacy*, 77 Yale L.J. 475, 487 (1968) ("[I]n our culture the excretory function are shielded by more or less absolute privacy, so much so that situations in which the privacy is violated are experienced as extremely distrescing, as detracting from one's dignity and self esteem.").

[9] *See* Georgia Code Ann. § 21-2-132 (giving a candidate a five day window in which to qualify).

unusual behavior or appearance. *Id.* The person collecting the specimen also must remain in the room during urination, outside the stall or partition. Within four minutes after urination, the temperature of the specimen is gauged. *Id.* Finally, if tampering is suspected, then a second specimen must be provided under direct observation. *Id.*

In addition, if the candidate is taking any of the proscribed substances pursuant to a medical prescription or if the candidate is taking any other medication that might interfere with testing result, the candidate will need to disclose the medication to the laboratory. Thus, even if a candidate chooses (and is able)[10] to provide a urine specimen to his or her own physician, he or she may nevertheless be required to disclose personal medical information to a complete stranger. In *Acton*, the Court observed that advance disclosure of such medical information is a "cause for concern." *Id.* at 2394. Similarly, one of the consequences of the requirement that a candidate take the test within 30 days before qualifying for nomination or election is that it will be extremely difficult for a candidate to maintain the confidentiality of a positive test result. If, for example, a candidate is nominated by his or her political party, and then withdraws from the race, such withdrawal will invariably raise suspicions that it was prompted by a failed drug test. Accordingly, section 21-2-140 does not allow for the same degree of privacy in test results as any of the programs this Court has previously upheld.

Petitioners do not have diminished expectations of privacy by virtue of running for office. In *Von Raab*, this Court noted that "background investigations, medical examinations, or other intrusions . . . may be expected to diminish their expectations of privacy in respect of a urinalysis test." 489 U.S. at 677. Similarly, in *Acton*, the Court observed that student-athletes had a "decreased expectation of privacy" because "school locker rooms . . . are not notable for the privacy they afford," and because students who participate in athletics "subject themselves to a degree of regulation even higher than that imposed on students generally."

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[10] Given the burdens imposed by the HHS Guidelines, it remains to be seen whether private physicians will make themselves available for qualifying drug tests.

115 S. Ct. at 2392-93. This case does not involve such diminished expectations. Candidates for public office in Georgia are subjected neither to compulsory medical examinations, to rigorous background checks, nor to communal showers.

Respondents contend that qualified candidates should have a diminished expectation of privacy because they already must make certain financial disclosures under Georgia law. *See* Georgia Code Ann. § 21-5-50. But financial disclosure requirements are simply not as invasive as mandatory urinalysis drug testing. The most obvious difference is that drug testing "deal[s] with intrusions into the human body rather than with state interferences with property relationships or private papers. . . ." *Winston* , 470 U.S. at 760 (quoting *Schmerber v. California*, 384 U.S. 757, 767-768). Violations of bodily integrity implicate the "most personal and deep-rooted expectations of privacy." *Id.* To hold that a financial disclosure requirement so diminishes a candidate's expectation of privacy to justify drug testing is to stretch this Court's Fourth Amendment jurisprudence beyond recognition.

The fact that candidates for public office are subjected to public scrutiny by the news media and the electorate obviously has no effect on the scope of their rights under the Fourth Amendment; otherwise sports heroes and movie stars trailed by *paparazzi* photographers would have no Fourth Amendment rights at all. Whatever access to their personal lives movie stars or political candidates voluntarily grant to the media is irrelevant to the government's power to invade their privacy without their consent. As this Court has noted, "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the *State*." *Schmerber*, 384 U.S. at 767 (emphasis added).[11] Indeed, the very existence of media and

[11] Similarly, a decrease in privacy expectations may not be justified by the prevalence of applicant testing among large private employers. Reliance on this factor to define the proper boundaries of Fourth Amendment reasonableness would be a marked departure from the decisions of this Court; it would suggest that an otherwise unlawful search can be made lawful if it is performed frequently enough by non-governmental entities. The existence of suspicionless urinalysis testing in the private sector cannot of its own force legitimize a search objectively considered intrusive, such as compulsory urinalysis. The most obvious reason is that the Fourth Amendment's constraints do not apply to the private sector. *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (Fourth Amendment applied only to government searches). Thus, nowhere in *Von Raab*, *Skinner* or *Acton* did this Court consider private employer practices in gauging the privacy expectations of those whom the government would search. Any attempt to import private industry norms in the Fourth Amendment balance would result in a kind of constitutional privatization alien to our most cherished traditions. It turns on its head Justice Brandeis' famous aphorism—articulated in a Fourth Amendment case—that government is "the potent, the omnipresent teacher" that "[f]or good or for ill . . . teaches the whole people by its example." *Olmstead v. United States, supra*, 277 U.S. at 485 (Brandeis, J., dissenting), *overruled, Katz v. United States*, 389 U.S. 347 (1967). The protections of the Fourth Amendment will quickly vanish if courts adopt the conduct of the private sector as the benchmark of "reasonableness." Even when acting as employer, the government is held to a standard that private actors are not—the Constitution of the United States.

public scrutiny of political candidates undercuts the State's justification for drug testing, for the election campaign itself is the best test of whether a candidate "ha[s] what it takes" to exercise good judgment.

Nor does a candidate's advance warning of a drug testing requirement, or his or her ability to avoid the testing process by withdrawing from nomination or election, justify a lower expectation of privacy. If simply by providing advance notice the government could make lawful an otherwise suspicionless search, candidates could be subjected to suspicionless, warrantless searches of their homes as a precondition of public employment. This same factor wa present in *Von Raab*, but the Court attributed very little significance to it. Indeed, while advance notice might "reduc[e] to a minimum any 'unsettling show of authority' that may be associated with unexpected intrusions on privacy," *Von Raab*, 489 U.S. at 672 n.2 (citation omitted), it does not reduce the other unsettling aspects of an intrusive search—the loss of personal privacy and dignity and the violation of bodily integrity. The government cannot avoid the dictates of the Fourth Amendment simply by giving notice of an impending intrusion.

Finally, the liberty interests at stake here go beyond those at issue in *Skinner, Von Raab* and *Acton*. This case involves much

more than the right of a student to participate in school athletics or the right of an adult to hold a job. While a prospective candidate can "choose" not to run for office, just as a prospective applicant can "choose" not to apply for a job or an athlete can "choose" not to try out for a team, we ought to be far more circumspect in burdening the first of these choices. As this Court has declared, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The ramifications of this case go directly to the core of our democratic system—a candidate's right to run for elected office, and the right of the electorate, and not the government, to decide whether that candidate is qualified for public office.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Eleventh Circuit and hold that section 21-2-140 violates the Fourth Amendment Prohibition of unreasonable searches and seizures.

Respectfully submitted,

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